IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-260

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Appellant*,

against

PATRICK J. CUNNINGHAM; BRONX COUNTY DEMOCRATIC EXECUTIVE COMMITTEE; and NEW YORK STATE DEMOCRATIC COMMITTEE, *Appellees*.

MOTION TO DISMISS OR AFFIRM

EDWARD BENNETT WILLIAMS
MICHAEL E. TIGAR
1000 Hill Building
Washington, D. C. 20006
(202) 331-5000

Counsel for Appellee
Patrick J. Cunningham

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Appellee, Patrick J. Cunningham, by his undersigned counsel and pursuant to Supreme Court Rule 16, subdivisions 1(c) and 1(d), moves to dismiss or affirm on the grounds that:

1. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; and

2. There is a substantial likelihood that the cause will become moot within the time which would be required for full briefing, argument, and plenary consideration by this Court.

STATEMENT OF THE CASE

Appellee has no substantial quarrel with the statement of the case contained in the Jurisdictional Statement and with the statement of facts in the opinion below.

ARGUMENT

I. The Decision of the Three-Judge Court Was Manifestly Right and Presents No Substantial Question for Determination by This Court.

A.

The court below properly concluded that this Court's decisions in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n.* v. *Commissioner*, 392 U.S. 280 (1968); and *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), compelled it to hold New York Election Law § 22 unconstitutional.

Contrary to the implications of the Jurisdictional Statement, Election Law § 22 is not simply a prophylactic device, narrowly drawn to achieve the laudatory and limited purpose of compelling public officials to account for their conduct in office. The Special Prosecutor was seeking evidence from Appellee upon which to ground an indictment, and not merely engaged in a generalized investigation of Appellee's discharge of party duty. Appellee has, in fact, since been indicted. Moreover, New York Election Law § 22 not only works a forfeiture of Appellee's party positions, to which he was elected by the suffrage of his fellow Democrats, but would also disqualify him from any party or public office for a period of five years.

The court below quite properly found that invalidation of New York Election Law § 22 does not leave

Appellant entirely disarmed in the battle against corruption in public life. By his citation of *Uniformed Sanitation Men Ass'n.* v. *Commissioner*, 426 F.2d 619 (2d Cir. 1970), District Judge Tenney recognized that a more narrowly drawn provision providing for use immunity might well be permissible.

B.

Appellant cites *Baxter* v. *Palmigiano*, 424 U.S. — (April 20, 1976) and suggests that this Court has sounded a retreat from the principles so recently reaffirmed in *Lefkowitz* v. *Turley, supra*. *Baxter* holds that an adverse inference may be drawn from an inmate's silence in an essentially non-criminal prison disciplinary proceeding. The inference would be of no more weight than ought rationally, based upon the whole record, to be given it in a particular case. See I, C, *infra*.

By contrast, New York Election Law § 22 makes the refusal to testify conclusive, and would disqualify Appellee from party or public office without more. To attach such consequences to invocation of a constitutional privilege is at war with the fundamental concept of the fifth amendment. The distinction has clearly been drawn, in the course of our constitutional history, between permitting a suspect or accused, to take an oath *de veritate dicenda*, that is to tell the truth, and forcing him to do so upon the threat of punishment if he refuses. This latter oath, the oath *ex officio*, was an instrument of Tudor and Stuart tyranny against which Parliament remonstrated in setting aside the sentence of John Lilburn. The proceedings are described in

1 J. Stephen, *A History of the Criminal Law of England* 343-345 (1883):

> "Be this as it may, the extreme unpopularity of the *officio* oath is set in a clear light by the case of John Lilburn. . . . He was committed to the Gatehouse 'for sending of factious and seditious libels out of Holland into England.' He was afterwards ordered by the Privy Council to be examined before the Attorney-General, Sir John Banks. He was accordingly taken to the Attorney-General's chambers, 'and was referred to be examined by Mr. Cockshey his chief clerk; and at our first meeting together he . . . began with me after this manner. Mr. Lilburn, what is your Christian name?' A number of questions followed, gradually leading up to the matter complained of. Lilburn answered a good many of them, but at last refused to go further, saying, 'I know it is warrantable by the law of God, and I think by the law of the land, that I may stand on my just defence, and not answer your interrogatories, and that my accusers ought to be brought face to face, to justify what they accuse me of.' . . . Some days after he was taken to the Star Chamber office that he might enter his appearance. . . . Lilburn thought the object of the examination was to get materials for a bill, and accordingly when the head of the office tendered him the oath 'that you shall make true answer to all things that are asked you,' he refused to do so, saying, first, I am but a young man and do not well know what belongs to the nature of an oath.' Afterwards he said he was not satisfied of the lawfulness of that oath, and after much dispute absolutely refused to take it. After about a fortnight's delay he was brought before the Star Chamber, where the oath was again tendered to him and he again refused it on the ground that it was an oath of inquiry for the lawfulness of which he had no warrant. . . . On the following day they [Lilburn and a fellow prisoner, Wharton] were brought up again. Lilburn declared, on his word and at length, that the charges against him were entirely false, and that the books objected to were imported by another person with whom he had no connection. 'Then,' said the Lord Keeper, 'thou wilt not take the oath and answer truly.' Lilburn repeated that it was an oath of inquiry and that he found no warrant in the word of God for an oath of inquiry. . . . . As both absolutely refused to take the oath they were each sentenced to stand in the pillory, and to pay a fine of £500, and Lilburn to be whipped from the Fleet to the pillory, which stood between Westminster Hall Gate and the Star Chamber. Lilburn was whipped accordingly, receiving, it was said, upwards of 500 lashes, and was made to stand in the pillory for two hours after his whipping. In May, 1641, the House of Commons resolved 'that the sentence of the Star Chamber given against John Lilburn is illegal, and against the liberity of the subject: and also bloody, cruel, barbarous, and tyrannical.'"

See also Lilburn's Case, 3 Cobbett's State Trials 1315 (1637); H. Silving, *The Oath*, 68 Yale L. J. 1329 (1959). *Liburn's Case* has continued to inform this Court's decisions on the central meaning of the privilege against self-accusation. *Miranda* v. *Arizona*, 384 U.S. 436, 459 (1966).[1]

C.

Conclusively to presume guilt from silence would offend the due process clause, a point not reached by

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[1] Oaths of the type demanded of Appellee have often been condemned in our constitutional history. The result, if not the rationale, of *Cummings* v. *Missouri*, 71 U.S. 277 (1867) and *Ex parte Garland*, 71 U.S. 333 (1867) reflect this concern. Alexander Hamilton wrote on this subject: see *Cummings, supra*, 71 U.S. at 330-32.

the court below. Inferences and presumptions are to be given no more weight than reason permits. *Leary* v. *United States,* 395 U.S. 6 (1969); *United States* v. *Romano,* 382 U.S. 136 (1965). As Justice Clark said in *Slochower* v. *Board of Education*, 350 U.S. 551, 557-58 (1956):

> "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' *Brown* v. *Walker*, 161 U.S. 591, 610. We have reaffirmed our faith in this principle recently in *Quinn* v. *United States*, 349 U.S. 155. In *Ullmann* v. *United States*, 350 U.S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege served to protect the innocent who otherwise might be ensnared by ambiguous circumstances. See Griswold, The Fifth Amendment Today (1955)."

In *Baxter* v. *Palmigiano, supra*, this Court distinguished the use of silence as a basis for an inference from its use as a basis for punishment:

> "In this respect, this case is very different from the circumstances before the Court in the Garrity-Lefkowitz decisions, where refusal to submit to interrogation and to waive the Fifth Amendment

> privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogation was treated as a final admission of guilt."

424 U.S. at — (47 L.Ed.2d at 821).

D.

The first amendment freedom of association is also in this case. See *Buckley* v. *Valeo*, 424 U.S. 1 (1976). A political party's organization of its affairs, and even its decisions to commit substantial power to party professionals, are entitled to first amendment protection. *Ripon Society* v. *National Republican Party,* 525 F.2d 567, 585-86 (1975). If party members wish to remove Mr. Cunningham, they have a remedy. *See* New York Election Law § 16. If he is convicted of a crime, his removal will follow. The question here is whether New York may, consistent with the first amendment, place in the hands of the Special Prosecutor, a public official named to his position by a political officer of the competing major party, power to work a forfeiture of the offices to which Appellee was duly elected, and to do so by the simple expedient of offering Appellee a choice between forfeiture and compelled testimony.

Here as elsewhere in the first amendment's domain, the State must seek less onerous alternative means to achieve its objective of rooting out corruption. *United States* v. *Robel,* 389 U.S. 258 (1967); *Schneider* v. *New Jersey,* 308 U.S. 147 (1939).

Moreover, the Appellant's argument that Appellee forfeits his fifth amendment right by exercising his first amendment right to seek office simply cannot bear